NO. 42434-7

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DANIEL WAYNE BURGESS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Beverly G. Grant

No. 10-1-04683-8

Response Brief

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly deny defendant's motion for mistrial after it struck from the record an allegedly prejudicial statement and offered a curative instruction to the jury?

B. STATEMENT OF THE CASE.

1. Procedure

The Pierce County Prosecuting Attorney's Office (State) charged Daniel Wayne Burgess (defendant) with one count of burglary in the second degree on November 4, 2010. CP 1. Defendant's jury trial began on July 11, 2011. *See* RP 4–9.

Defendant moved the court for a mistrial during his cross-examination of one of the State's witnesses when the witness gave a hearsay statement about how he knew defendant. RP 71. The court denied the motion, but struck the witness's answer and instructed the jury to disregard the statements. RP 73–74. When the witness finished testifying, defendant renewed his motion for a mistrial. RP 78–92. The court denied the motion after allowing the parties to brief the matter overnight and hearing argument on the matter. RP 114.

The jury found defendant guilty of burglary in the second degree. RP 138. On August 2, 2011, the court sentenced defendant to 43 months in custody. CP 65–66 (paragraph 4.5); RP 145. Defendant timely filed his appeal that same day. CP 72.

2. Facts

Around midnight on August 5, 2010, Natasha Kieszling and her friend Ana-Maria Hourigan called defendant to meet up. RP 17–18, 40. Ms. Kieslzling had met defendant on MySpace and had gone out with him on an earlier occasion. RP 41. They met defendant and two of his friends at an elementary school, where they decided to go to a Valero gas station in Tacoma on a "beer run." RP 18–20, 41. The gas station was closed. *See* RP 56–57.

Defendant and his friends directed Ms. Hourigan—who drove the rest of the group—to the gas station. RP 20–21, 41–42. Upon arrival, Ms. Hourigan parked her car in an alley near the gas station, where defendant and one of his friends got out and headed towards it. RP 20, 42–43. Although neither Ms. Hourigan nor Ms. Kieszling could testify where the defendant and his friend went, they testified that defendant and his friend came running back to the car five to ten minutes later carrying beer and boxes of cigarettes, yelling at Ms. Hourigan to "Go. Go. Go." RP 22–24, 31–32, 41–42, 52. Once inside the car, Ms. Hourigan drove to another area where defendant and his friends got out of the car and left, carrying the stolen merchandise with them. RP 24–25, 44.

The gas station was closed at the time of the incident. RP 67–68. The gas station owner was alerted by his alarm company that someone had broken in to the station around one in the morning. RP 57. Security cameras that captured the burglary show two individuals, one wearing a bright orange shirt loosely over his neck, breaking in through the back door and burglarizing the store. EX A, B. Both Ms. Hourigan and Ms. Kieszling testified that defendant was wearing a bright orange shirt on the night they went to the gas station. RP 27, 46. Defendant and his friend threw big stones through the gas station's windows in order to gain entry. RP 57, 60–61, 85.

Officers who responded to the burglary were provided a license plate number and vehicle description of Ms. Hourigan's vehicle by a 9-1-1 call.[1] RP 92. They found Ms. Hourigan and Ms. Kieszling moments later on Ruston Way and pulled them over. RP 26, 25, 92–93. Ms. Hourigan testified that about only 15 minutes had passed between the burglary and her being pulled over. RP 26. The women cooperated with officers and related everything that happened. RP 26, 45. Officers later found and arrested defendant. RP 99.

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[1] It is unclear from the record who actually called 9-1-1 to provide the information to the officers. However, Ms. Hourigan and Ms. Kieszling testified that someone in a truck followed them for a short distance after defendant and his friends burglarized the store, momentarily shining a spotlight on them. RP 22–24, 32–33, 52.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR MISTRIAL WHERE IT STRUCK THE ALLEGEDLY PREJUDICIAL STATEMENTS AND INSTRUCTED THE JURY TO DISREGARD IT[2]

The court reviews a trial court's denial of a motion for mistrial for an abuse of discretion. ***State v. Rodriguez***, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). The high standard is very deferential to the trial court, which has seen and heard the proceedings and "is in a better position to evaluate and adjudge than can [the reviewing court] from a cold, printed record." ***State v. McKenzie***, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting ***State v. Wilson***, 71 Wn.2d 895, 899, 771 P.2d 711 (1967)). A trial court abuses its discretion when no reasonable judge would have reached the same conclusion. ***Rodriguez***, 146 Wn.2d at 269.

When determining the effect of an irregular occurrence at trial, the court examines (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether the court properly instructed the jury to disregard it. ***State v. Johnson***, 124 Wn.2d 57, 76, 873 P.2d 514 (1994)

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[2] The State recognizes that defendant assigns error to the trial court's denial of his motion for mistrial, and the denial of his right to a fair trial. Because defendant's right to a fair trial hinges on whether the trial court properly denied defendant's motion, only the former issue is dealt with here.

(citing ***State v. Hopson***, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)). "The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. *Only errors affecting the outcome of the trial will be deemed prejudicial.*" ***Johnson***, 124 Wn.2d at 76 (emphasis added). When the court instructs the jury to disregard a statement, the jury is presumed to follow the court's order. A jury is presumed to follow the court's instructions. *Id.* at 77.

In ***State v. Post***, 59 Wn. App. 389, 797 P.2d 1160 (1990), during direct examination, a detective stated that he found the defendant by "a telephone information call from an individual who gave us his name." *Id.* at 394. Defense counsel objected, arguing that the statement was hearsay, violated a motion in limine, and deprived the defendant of a fair trial. *Id.* at 394–95. On appeal, the court determined that the statement was not hearsay and dismissed the claim. *Id.* at 395. More importantly, the court stated that "[e]ven assuming that this testimony violated the [motion in limine], it does not necessarily follow that a mistrial should be ordered, *when the jury is properly instructed to disregard.*" *Id.*

In this case, when the prosecutor asked the gas station owner whether he knew the defendant during direct examination, the witness answered, "I've never seen [defendant] myself but my cashiers alerted me and many customers did." RP 64. Defendant did not object to that

response, thereby allowing the jury to hear that the witness had been alerted by his customers and cashiers.

Defense counsel elicited a similar response by bringing up the subject again during cross-examination:

> [Defense counsel]. There was a [security] tape, a DVD?
>
> A. Yes.
>
> Q. Two people came through that door that was broken?
>
> A. Yes.
>
> Q. Did you recognize them —
>
> A. I recognize them from the hair.
>
> Q. I thought you just testified you didn't recognize them?
>
> A. I didn't say that.
>
> Q. *You said something about your cashiers alerted you?*
>
> A. No. I said personally I don't know him but I have seen him on my cameras many times, because they alerted me that the whole neighborhood knows him and they told me like, you know, many incidents.
>
> [Defense counsel]: Objection —

RP 69–71 (emphasis added). Not only did defense counsel ask an open-ended question, but he specifically requested the witness to explain how he knew defendant (via his cashiers).

Defense counsel objected while the witness was answering counsel's question, which was phrased in such a way that it would be

nearly infeasible to answer without hearsay. The trial court even recognized this when it responded, "Well, I can't tell if it's nonresponsive until I hear the answer. *The answer is the answer. It may not be the answer you want but it is his answer.* So go ahead, please." RP 69–70 (emphasis added). Nonetheless, the court responded by instructing the witness to answer only what was being asked of him. RP 70.

> Defense counsel objected again a few questions later:
>
> Q. What I asked you is did you know him personally? Do you know this man personally?
>
> A. Never talked to him but I seen him on the video.
>
> Q. Okay. And you've seen him on the video. This video?
>
> A. No. Many times they point at like say 9 o'clock he came in with another person, and he bragged about breaking in, and then I look and I see it.
>
> [Defense counsel]: Objection, Your Honor.

RP 70. In response to the objection, the court momentarily excused the jury, and defendant moved for mistrial. RP 71. Although the court instructed the parties to brief the matter, only the State filed a brief. RP 78–82, 105; CP 33–37. The court denied defendant's motion after reviewing the State's brief and hearing argument from both parties. RP 114.

The trial court properly denied defendant's motion because the witness's hearsay statement was both minor and cumulative. Prior to defendant's motion for mistrial, the witness had already testified about receiving information from his cashiers during direct examination—statements that were not objected to—and cross examination when defense counsel asked him specifically about it. By the time the witness made the allegedly prejudicial statement, the point was already cumulative.

Because the jury already knew about the cashiers identifying defendant, the only new information from this testimony was that defendant had bragged about the crime to the cashiers. Admittedly, this statement was nonresponsive—but the trial court properly addressed the problem by striking the statement from the record and instructing the jury to disregard it. RP 73–74. Additionally, the court's instructions to the jury stated:

> The evidence that you are to consider during your deliberation consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. *If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.*

CP 39 (Instruction No. 1) (emphasis added). The jury is presumed to have followed the court's instructions. ***Johnson***, 124 Wn.2d at 77.

Finally, the trial court properly denied defendant's motion for mistrial because the statements in question did not likely affect the

outcome of the case. The trial court, after a thorough hearing of defendant's motion for mistrial, concluded that "there was enough evidence without [the victim's] testimony that the jury could infer innocence or guilt, and I don't think it was determinative on [the victim's] statements." RP 114.

The jury heard testimony from two of defendant's companions from the night of the burglary, and both identified him as wearing a bright orange shirt that night. Defendant was caught on video breaking into the gas station while wearing the orange shirt. It would be unreasonable to find that this was an abuse of discretion. The trial court properly denied defendant's motion for mistrial because the statements had no impact on the outcome of the proceedings. ***Johnson***, 124 Wn.2d at 76.

D. CONCLUSION.

The trial court properly denied defendant's motion for mistrial because the statements in controversy were minor and cumulative. Additionally, the trial court took reasonable measures to correct the hearsay statement by instructing the jury to disregard the testimony, and struck it from the record. Because the trial court properly denied the motion, defendant was not denied his right to a fair trial. For the reasons

argued above, the State respectfully requests that this Court uphold defendant's conviction.

DATED: February 15, 2012.

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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail or~~ ABC-LMI delivery to the attorney of record for the appellant and ~~appellant~~ c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2-15-12 Helen Ko
Date Signature

PIERCE COUNTY PROSECUTOR

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